85-1604

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF UTAH,

Petitioner,

v.

ROBERT PAUL PACHECO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

DAVID L. WILKINSON
Utah State Attorney General

BY: EARL F. DORIUS
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114
(801) 533-7650

Attorneys for Petitioner

QUESTION PRESENTED

1. Did the Utah Supreme Court incorrectly hold that the Instructions given to the jury in State v. Pacheco, ____ P.2d ____ Utah Sup. Ct. No. 20047 (filed October 21, 1985), created a mandatory rebuttal presumption and thus were unconstitutional under Francis v. Franklin, ____ U.S. ____, 105 S.Ct. 1965 (1985)?

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October Term, 1985

STATE OF UTAH,

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v.

ROBERT PAUL PACHECO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

INTRODUCTION

Petitioner, the State of Utah, respectfully requests that this Court grant this petition for a writ of certiorari which seeks review of the Utah Supreme Court's judgment in State v. Pacheco, ____ P.2d ____, Utah Sup. Ct. No. 20047 (filed October 21, 1985).

OPINIONS BELOW

The slip opinion of the Utah Supreme Court in State v. Pacheco, appears as Appendix A to this petition. A copy of that court's order denying the State's petition for rehearing appears as Appendix B. The published opinion of the Utah Supreme Court in State v. Chambers, 709 P.2d 321 (Utah 1985), a case relied upon in Pacheco and filed the same day, appears as Appendix C.

JURISDICTION

The opinion of the Utah Supreme Court was filed on October 21, 1985 (Appendix A). On January 8, 1986, an order denying the State's petition for rehearing was denied (Appendix B). The State's petition for rehearing tolled the period in which this petition for certiorari had to be filed, SUP. CT. R. 20.4; therefore, this petition is timely filed.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and SUP. CT. R. 17.1(c).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Respondent, Robert Pacheco, was charged by information with burglary of a dwelling, a second degree felony, under UTAH CODE ANN.

§ 76-6-202 (1978). A jury found him guilty as charged. Pacheco, slip op. at 1 (Appendix A). On direct appeal, the Utah Supreme Court reversed Pacheco's conviction and remanded the case for a new trial on two grounds: (1) the jury instruction on possession of property recently stolen was unconstitutional under Francis v. Franklin, _____ U.S. ____, 105 S.Ct. 1965 (1985), and (2) the trial court erred in allowing into evidence Pacheco's statement concerning a prior burglary. Id. at 3-4. The State petitioned for rehearing on both of those holdings; however, that petition was denied without comment (Appendix B). The State seeks this Court's review only of the Utah Supreme Court's application of Francis.

B. The Pertinent Factual Background

At trial, the State presented evidence that a police officer, who had been alerted to watch for a certain vehicle connected with

a burglary of a home that afternoon, stopped Pacheco and searched his vehicle. Pacheco, slip op. at 1 (Appendix A). The officer found property that had been taken in the burglary. Id. The trial court gave the jury the following instruction:

> "The law of the State of Utah provides as follows:
>
> 'Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property.'
>
> Thus, if you find from the evidence and beyond a reasonable doubt, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too remote in point of time from the burglary, and (IV) that the defendant had made no

satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property."

(Instruction No. 15, R. 129).[1] Additional relevant instructions were given.

Instruction No. 3 read:

"You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your

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[1] "R." refers to the record filed in the Utah Supreme Court on Pacheco's direct appeal.

satisfaction and beyond a reasonable doubt."

(R. 118). Instruction No. 12 read in pertinent part:

"All presumptions of law, independent of evidence, are in favor of innocence, and a defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal."

(R. 126). Instruction No. 16 read:

"Before you can convict the defendant of the crime of Burglary of a Dwelling as charged in the Information on file in this case you must believe from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 3rd day of June, 1983, at 443 East Vine Street, Murray, Utah the defendant, Robert Paul Pacheco, entered or remained in the dwelling of Masaji and Tsuruko Imai; and

2. That said defendant did so unlawfully; and

3. That said defendant did so with the intent to commit a theft.

If you are not convinced that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to find the defendant not guilty. If, on the other hand, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt then you must find the defendant guilty of Burglary as charged by the Information on file in this case."

(R. 130). And, Instruction No. 18 stated:

> "If, in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.
>
> The order in which the instructions are given has no significance as to their relative importance."

(R. 132). (emphasis added).

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT

POINT I

THE DECISION OF THE UTAH SUPREME COURT IN THIS CASE IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN FRANCIS V. FRANKLIN, ____ U.S. ____, 105 S.CT. 1965 (1985).

In State v. Pacheco, ____ P.2d ____, Utah Sup. Ct. No. 20047 (filed October 21, 1985), the Utah Supreme Court, relying on its analysis in State v. Chambers, 709 P.2d 321 (Utah 1985), held that the following jury instruction (Instruction No. 15) was unconstitutional under Francis v. Franklin, ____ U.S. ____, 105 S.Ct. 1965 (1985):

"The law of the state of Utah provides as follows:

'Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.'"

Pacheco, slip op. at 3 (Appendix A). However, in arriving at that conclusion, the court did not take into account the second paragraph of that instruction or other instructions also given to the jury. As noted in the Statement of the Case, the second paragraph read:

"Thus, if you find from the evidence and beyond a reasonable doubt, (I) that the defendant was in possession of property, (II) that the property was stolen in a burglary, (III) that such possession was not too

remote in point of time from the burglary, and (IV) that the defendant had made no satisfactory explanation of such possession, then you may find from those facts that the defendant committed the burglary in which such property was stolen and stole the property."

In deciding whether Instruction No. 15, in its entirety, was unconstitutional under Francis, the court necessarily had to consider both paragraphs of the instruction, as well as Instruction Nos. 3, 12, 16 and 18 (which are set forth above in the Statement of the Case).

The question presented in Pacheco was the same as that presented in Francis: Did the jury instruction "have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime?" Francis, 105 S.Ct. at 1970. As stated in Francis:

"The analysis is straightforward. 'The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.' Sandstrom, 442 U.S., Id., at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 52-524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed facts if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts,

but does not require the jury to draw that conclusion.

. . .

A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of Sandstrom. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. Ulster County Court, supra, 442 U.S., at 157-163, 99 S.Ct., at 2224-2227.

Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a

specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Cupp v. Naughton, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis 'requires careful attention to the words actually spoken to the jury . . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted

the instruction.' Sandstrom, supra, 442 U.S., at 514, 99 S.Ct., at 2545."

105 S.Ct. at 1971-72 (emphasis added). When this analysis is applied in assessing the validity of Instruction No. 15, it becomes clear that a reasonable juror could only have understood that instruction to contain a valid permissive inference. First, although the first paragraph of the instruction, if considered in isolation, could reasonable have been understood as creating a presumption that relieves the State of its burden of persuasion on the elements of burglary, when considered in the context of the instruction as a whole, a reasonable juror could not have considered that paragraph to have created an unconstitutional presumption. The second paragraph, which clearly is stated in the form of a permissible inference, serves to

explain the statement of law in the first paragraph. The words "shall be deemed prima facie evidence" are not readily understandable to the average juror, and, in fact, probable are not particularly well understood by many lawyers, as is evidenced by the confusion the Utah Supreme Court has experienced with the phrase. See State v. Chambers, 709 P.2d at 327. Therefore, a reasonable juror surely would have read the second paragraph which, significantly, begins with the word "thus," as explaining the statement of law in the first paragraph. No reasonable juror could have read Instruction No. 15 as requiring a finding that defendant was guilty of burglary once he found beyond a reasonable doubt the enumerated predicate facts. Given the wording of the instruction and viewing it as a whole, a reasonable juror would have understood that he may, not must, find

defendant guilty of burglary once satisfied that the predicate facts had been proved beyond a reasonable doubt. This conclusion is further supported by examining Instruction No. 15 in the context of the other instructions noted above--Instruction Nos. 3, 12, 16, and 18. In short, Instruction No. 15 did nothing more than instruct the jury on a "traditional common law inference deeply rooted in our law." Barnes v. United States, 412 U.S 837, 843 (1973).

It is clear that this Court is not bound by the interpretation given Instruction No. 15 by the Utah Supreme Court; "[t]he question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." Francis, 105 S.Ct. at 1972, citing Sandstrom v. Montana, 442 U.S. 510, 516-7 (1979). In applying

Francis, as analyzed and applied in State v. Chambers, to the instant case, the Utah Supreme Court failed to take into account the significant differences in the instructions at issue in Chambers and the Pacheco instructions. Consequently, the court arrived at a conclusion that is contrary to the law expressed in Francis.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Utah Supreme Court.

Respectfully submitted,

DAVID L. WILKINSON
Utah Attorney General

BY: EARL F. DORIUS
Assistant Attorney General
Chief, Gov'tl. Affairs Div.
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-7650

CERTIFICATE OF MAILING

This is to certify that I mailed 3 copies of the foregoing Petition for Writ of Certiorari by depositing same in the United States mail, first class, postage prepaid, this 28th day of March, 1986, to the following:

Mr. Sumner J. Hatch
72 East 400 South, Suite 330
Salt Lake City, Utah 84111

Attorney for Respondent,
Robert Paul Pacheco

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

This is to certify that I mailed 3 copies of the Petitioner's Petition for Writ of Certiorari in the case of State of Utah v. Robert Paul Pacheco, United States Supreme Court No. _____, by depositing same in the United States mail, first class, postage prepaid, this 28th day of March, 1986, to the following:

Mr. Sumner J. Hatch
72 East 400 South, Suite 330
Salt Lake City, Utah 84111

Attorney for Respondent,
Robert Paul Pacheco

Earl F. Dorius

EARL F. DORIUS

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 28th day of March, 1986.

Mildred E. Martinez

NOTARY PUBLIC
Residing in Salt Lake
County, Utah

My Commission Expires:

5-26-86

APPENDIXES

APPENDIX A

FOR PUBLICATION

IN THE SUPREME COURT OF THE
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

v.

ROBERT PAUL PACHECO,

Defendant-Appellant.

No. 20047

FILED
Oct. 21, 1985

Geoffrey J.
Butler, Clerk

HALL, Chief Justice:

Defendant appeals a jury verdict finding him guilty of burglary of a dwelling, a second degree felony. U.C.A., 1953, § 76-6-202 (1978 ed.). We reverse the conviction and remand for a new trial.

On June 3, 1983, Detective Jeff Anderson of the Murray City Police Department was on patrol in an unmarked vehicle. At approximately 3:15 p.m., the police dispatcher alerted officers to look out for a dark blue Chevrolet with shiny

wheels in connection with an afternoon home burglary. Several minutes latter, Anderson saw an empty car that fit the description parked on a side street near Vine Street and 400 East, approximately one mile from the reported burglary. As Anderson watched, a man approached the car on the sidewalk, walked past it, and about halfway up a residential driveway, turned around, walked back, got into the car on the driver's side, and drove away. Anderson turned on his flashers and pulled the car over. The driver, defendant, was driving with a suspended license. Anderson asked defendant if he could search the car. Defendant consented. Anderson found three $20 bills, three $1 bills, three rolls of nickles, and $26.95 in loose change in the console between the seats; a screwdriver on the floor on the passenger's side; and a ring tucked into the covering of the driver's seat.

Anderson placed defendant under arrest for driving with a suspended license and gave him a Miranda warning. Defendant told Anderson he was having trouble with his car stalling and had gone over to watch the golfers on a nearby golf course. Defendant replied: "I don't know about the ring. It may have been there from a previous burglary that I just got out of prison for." At trial, the judge excluded the portion of the answer concerning defendant's previous incarceration, but allowed the arresting officer to testify that defendant had stated that the ring "may have been there from a previous burglary."

On about June 13, several Murray City police cadets were canvassing neighborhoods inquiring about possible burglaries. At 443 Vine Street, the occupant, Mrs. Imai, told them that she had some

missing items; three $20 bills, about $25 in change, and some rolls of nickles. A few days later, a detective interviewed her. At that time, Mrs. Imai also reported that a man's ring was missing. After Mrs. Imai described the ring and drew a picture of it, the detective showed her the ring taken from defendant. Mrs. Imai positively identified it as her husband's. At trial, Mr. Imai also positively identified the ring as his. Neither Mr. nor Mrs. Imai had seen the ring since before they had moved to Murray from Helper in the spring of 1983. Mrs. Imai also identified one of the rolls of nickels as one she had brought back with her from a trip to Las Vegas. All of the cash had been in the house on June 2 but was not there on June 6.

At trial, the Iamis testified that neither of them had been in their house on the afternoon of June 3. Mrs.

Imai's mother had been in the house, but the mother was 89 years old and extremely hard of hearing. Testimony indicated that someone could easily have been in the house without her knowledge.

At trial, Mrs. Ivy Pacheco testified on behalf of her son. She said that defendant had been having car trouble and had taken his carburetor to a shop to be fixed. On June 3, she drove defendant to the shop to pick up the carburetor. She gave defendant $140 in $20 bills to pay for the carburetor and for insurance. Mrs. Pacheco also said that defendant had broken into his son's piggy bank that morning and gotten $13.80 in change and that he always kept change in the console between his car seats. She further testified that there were rolls of nickels around the house since she gambled in Wendover and Las Vegas occasionally.

The mechanic from the repair shop, a friend of Mrs. Pacheco's, testified that the repair bill for the carburetor was $93.41. Defendant offered five $20 bills in payment, but since the mechanic could not make change for a $20 bill, he took $80 and told defendant to bring the remaining $14 by later. The carbon copy invoice for the repair work was dated June 3, but that date was in ink and had been added later. The mechanic testified that he could not recall the exact date on which he did the work. He also noted that a "basket repair" carburetor (one brought in without the car) might not function properly after being repaired and could cause the car to stall.

At trial, the jury was instructed as follows:

> "Possession of property recently stolen, when no satisfactory explanation of such

possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

This instruction is a verbatim recitation of U.C.A., 1953, § 76-6-402(1).

In State v. Chambers,[2] this Court held that an identical instruction was unconstitutional since it directly related to the issue of guilt and relieved the State of its burden of proof.[3] The Court relied on Francis v. Franklin[4] in which the United States Supreme Court had held that the use of a mandatory rebuttable presumption in a jury instruction is unconstitutional. In

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[2] Nos. 19151-52, slip op. (Utah, October 21, 1985).

[3] Id. at 6-7.

[4] 105 S.Ct. 1965 (1985), see also State v. Walton, Utah, 646 P.2d 689, 691-92 (1982).

holding the challenged instruction unconstitutional in Chambers, the Court said that the instruction fit within the Francis definition of a mandatory rebuttable presumption: "A mandatory [rebuttable] presumption . . . requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted."[5]

That holding is dispositive of this case. Therefore, defendant is entitled to a new trial.

Defendant has raised one further point on appeal which will be at issue in a new trial and must therefore be resolved.

Defendant argues that the trial court erred in allowing Detective Anderson to testify during the State's case in chief

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[5] Francis, 105 S.Ct. at 1971 n.2 (citing Sandstrom v. Montana, 442 U.S. 510, 517-18 (1979)).

that defendant had stated in response to a question regarding the origin of the ring, "[I]t may have been there from a previous burglary." The defendant contends that this statement, elicited without defendant having taken the stand or put on evidence as to his character, could only be interpreted by the jury as an admission of burglary and, thus, was highly prejudicial to defendant's case. We agree.

Defendant's statement was admitted ostensibly for the purpose of showing defendant's explanation for having the ring in his possession in order to establish the inference set out in section 76-6-402(1). However, as the Court said in Chambers, the statute is addressed to the court, not to the jury.[6] Its sole purpose is to provide a standard by which to

---

[6] State v. Chambers, slip op., at 8.

determine whether the evidence admitted at trial warrants submission of the case to the jury.[7] If a defendant makes no satisfactory explanation of his possession of stolen property, the trial judge can conclude that the State has established a prima facie case against the defendant and submit the case to the jury. The standard remains the same whether the defendant offers an explanation for possession of the stolen property or remains silent. However, for the purposes of this standard, it is up to the defendant to offer an explanation. In the instant case, defendant did not take the stand and offered no explanation of his possession of the ring to the jury. Therefore, the trial judge would have been justified in assuming that a prima facie case of burglary had been made out against defendant.

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[7] Id. at 8-9.

Evidence of prior crimes is admissible if the evidence is relevant to prove a specific element of the crime for which a defendant is on trial. The evidence is not admissible if it is relevant solely to show a defendant's propensity to commit a crime.[8] Defendant's statement in no way is relevant to prove a specific element of the crime of burglary. Therefore, to admit the statement into evidence where defendant has offered no alternative explanation for his possession of the stolen property is highly prejudicial to defendant. The only possible effect the admission of such testimony could have would be to leave an impression with the jury of defendant's bad character. The admission of the testimony was therefore prejudicial error.

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[8] See State v. Saunders, Utah, 699 P.2d 738, 741 (1985); State v. Forsyth, Utah, 641 P.2d 1172, 1175 (1982).

Defendant's remaining contentions concern sufficiency of the evidence and jury instructions. In light of the remand of the case for a new trial, those issues need not be addressed.

WE CONCUR:

I. Daniel Stewart, Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice

APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

January 8, 1986

OFFICE OF THE CLERK

David L. Wilkinson, A.G.

Governmental Affairs Division

Attn: Dave Thompson

The State of Utah,

Plaintiff and Respondent,

v. No. 20047

Robert Paul Pacheco,

Defendant and Appellant.

THIS DAY, Petition for Rehearing is denied.

Geoffrey J. Butler, Clerk

APPENDIX C

FOR PUBLICATION

IN THE SUPREME COURT OF THE
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

v.

ROBERT PAUL PACHECO,

Defendant-Appellant.

No. 20047

FILED
Oct. 21, 1985

Geoffrey J.
Butler, Clerk

DURHAM, Justice:

Defendants James Chambers and Stanley Jacobsen appeal from a conviction of burglary, a second degree felony under U.C.A., 1953, § 76-6-202, and theft, a second degree felony under U.C.A., 1953, § 76-6-404. We reverse the convictions and remand for a new trial.

On January 6, 1983, an informant contacted officers of the Park City Police Department and told them that a burglary had taken place in the vicinity of Park City.

The informant stated that he knew who had committed the crime. Police officers met with the informant, who offered to take the officers to the residence where the stolen items were being held. At that meeting, the informant said that some of the items involved in the burglary were stereos with speakers, video cassettes, televisions, and clothing. The informant then took the officers to the residence of James Chambers. The informant also arranged a meeting between defendants and a Park City police officer operating under cover; the purpose of the meeting was to have the undercover officer make a "buy" of some of the stolen property from defendants. On January 7, the officer, the informant, and defendants met at the informant's apartment. After some conversation in which defendants expressed concern about the possible presence of police in the area, defendants took the

officer outside to a car and showed him a video cassette recorder which the officer brought for $200.

Also on January 7, a burglary was reported by a Summit Park resident, Richard Thompson. Mr. Thompson had returned home that day after a business trip and discovered that his home had been burglarized. He reported missing a Sony video cassette recorder, a cassette deck, stereo equipment, a pistol, a leather coat, and a pair of Tony Lama cowboy boots. Mr. Thompson later identified the video cassette recorder purchased from defendants as the one missing from his home.

On January 10, 1983, an officer of the Park City Police Department obtained a search warrant for defendant Chambers' residence. Defendant Jacobsen was also living in the residence at the time. Pursuant to the warrant, officers searched

the home and seized one pair of Tony Lama boots and a .22 caliber pistol. At trial, Mr. Thompson identified the pistol and the boots as those stolen from his home.

Prior to trial, defendants filed a motion to suppress the evidence seized pursuant to the search warrant. They also filed a motion to require the State to disclose the identity of the confidential informant. Both motions were argued before the trial court and were subsequently denied.

At trial, defendants presented testimony which sought to establish their whereabouts at the time of the crime. Defendants also presented evidence in explanation of their possession of the video cassette recorder, the pistol, and the cowboy boots.

On appeal, defendants raise five issues: invalidity of the search warrant,

denial of due process by the court's failure to require the State to disclose the identity of the confidential informant, two constitutional errors in connection with jury instructions, and insufficiency of the evidence.

Defendants' first argument is that the trial court erred by not suppressing the evidence seized pursuant to the search warrant; defendants claim that the underlying affidavit was not sufficient based on the two-pronged test established in Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and followed in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 22 L.Ed.2d 637 (1969). Defendants concede that under the "totality of the circumstances" test articulated by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) the

affidavit would have been sufficient. However, defendants contend that the Gates test is not the appropriate test to be applied in this case, because the Gates test was prospective only. In particular, defendants rely on the following language:

> For all of these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place, we reaffirm the totality of the circumstances analysis that traditionally has formed probable cause determinations.

426 U.S. at 238, 103 S.Ct. at 2332 (footnote and citations omitted). It is this very language, however, that indicates that the totality of the circumstances test is the traditional analysis and that the two-pronged test was a supplementary standard which was superimposed on the traditional

test. By "reaffirming" the traditional analysis, in effect, Gates stripped away certain refinements and retained the simpler totality of the circumstances test, thereby returning probable cause analysis to its traditional basis. Further, in Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), the Supreme Court retroactively applied the Gates test to determine the validity of a search warrant issued in September 1980, almost three years prior to the announcement of the Gates decision. We find, therefore, that the application of the totality of the circumstances test was proper here.

Defendants next contend that they were denied due process of law because the trial court failed to require the State to disclose the identity of the confidential informant. Rule 36 of the Utah Rules of Evidence, which was applicable at the time of trial, provides:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

Utah R. Evid., Vol. 9B, U.C.A. 1953 (1977).

In State v. Forshee, Utah, 611 P.2d 1222 (1980), we said, "There are two exceptions to the general privilege of non-disclosure of an informer's identity. Disclosure is required (1) when the

informer's identity is already known, and (2) when disclosure is essential 'to assure a fair determination of the issues.'" Id. at 1224 (citing from Rule 36, Utah R. Evid.). Because it was evidence that the defendant in that case knew the identify of the informant, we further said:

> However, it is defendant's very knowledge of the informer's identity that further served to vitiate any prejudice that may have otherwise resulted from the lower court's failure to require disclosure. Thus, the court's failure to require disclosure of the informer's identity, in any event, is at best harmless error.

Id. at 1225 (citation omitted). From our review of the record it is equally evident that defendants in this case were aware of

the identity of the confidential informant.[9] Therefore, we conclude that Forshee is dispositive and that defendants' claim is without merit.

Defendants raise two issues concerning the jury instructions that were given at trial. Defendants' claims focus on jury instruction No. 18 which contained the following:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof.

[9] The testimony of the officers about this circumstance of their introduction to the defendants, and the events in which the informant participated, make it clear that the informant was known to the defendants, and readily identifiable by them once his part in the proceedings was disclosed.

> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

This instruction is in part based on U.C.A., 1953, § 76-6-402(1). Defendants first contend that instruction No. 18 improperly comments upon a defendant's failure to testify and that it penalizes the accused for exercising the constitutional right to remain silent. On that basis, defendants argue that the jury instruction was improper and that the underlying statute is unconstitutional. Defendants' second claim is that the instruction shifts the burden of proof to defendants and is therefore inconsistent with defendants' rights to be presumed innocent.

Defendants' first argument, that the instruction infringes on federal Fifth Amendment rights, is not persuasive. Nothing in the instruction required testimony by defendants, because an explanation of possession could have been made by the testimony of other witnesses or by other evidence. In a similar situation, the United States Supreme Court found this argument to be without merit: "Petitioner also argues that the permissive inference in question infringes his privilege against self-incrimination. The Court has twice rejected this argument." Barnes v. United States, 412 U.S. 837, 846, 93 S.Ct. 2357, 37

L.Ed.2d 380 (1973).[10] Therefore, we conclude that defendants' argument on this point is not compelling. See also Annot., 88 A.L.R.3d 1178 (1978) (indicating the trend established in recent cases that

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[10] In Barnes, the disputed instruction included a statement that the petitioner had a right not to take the witness stand and also that evidence other than defendant's testimony could explain possession. In the instant case, the jury was only instructed on defendant's privilege to not testify. There was, however, testimony by defendant Chambers' wife which attempted to explain possession of some of the items involved in this case. Thus, the possibility of explanation provided by evidence other than defendant's testimony should have been obvious to the jury.

instructions such as the one in question do not constitute an improper comment by the court on the defendant's failure to testify, and do not violate the privilege against self-incrimination).

Defendants' second claim regarding the jury instruction is more problematic. Defendants argue that instruction No. 18 violates their rights to a presumption of innocence and improperly shifts the burden of proving innocence to defendants. Instruction No. 18 refers to a statutory presumption which links the basic fact of possession of recently stolen property, in the absence of a satisfactory explanation of possession, to the ultimate fact or conclusion that the person in possession stole the property. The presumption does not mandate a finding of guilt; it merely provides that proof of the basic fact is sufficient to serve as prima facie evidence

of the ultimate fact. Inferences and presumptions are common fact-finding devices whereby one fact is used to determine the existence of another fact. County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979); State v. Robichaux, Utah, 689 P.2d 207, 208 (1981).

"[I]n criminal cases, the ultimate test of any [evidentiary] device's constitutional validity in a given case remains constant: the device must not undermine the fact-finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Allen, 442 U.S. at 156, 99 S.Ct. at 2224 (citations omitted). In their argument, defendants rely on State v. Walton, Utah, 646 P.2d 689 (1982), where this Court found reversible error based on an instruction which read, "[T]he law

presumes that a person intends the reasonable and ordinary consequences of his own acts." In Walton, we followed Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), which held that an identical instruction violated due process. In Sandstrom, the Supreme Court reasoned that the jury could have interpreted the presumption as irrebuttable or alternatively as requiring a high level of proof in order to rebut the presumption, thereby "effectively shifting the burden of persuasion. . . . " id. at 517, 99 S.Ct. at 2456. The standard established in Sandstrom is "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in [In re] Winship [397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)]. . . ." Id. at 521, 99 S.Ct. at 2458. As the Court noted in Sandstrom, Id. at 520, 99 S.Ct. at 2457, In re

Winship held that the due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." 397 U.S. at 364, 90 S.Ct. at 1073.

The United States Supreme Court has recently once again addressed the constitutionality of presumptions used in jury instructions. In Francis v. Franklin, ____ U.S. ____, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Court dealt with an instruction quite similar to that held unconstitutional in Sandstrom. Using the same "threshold inquiry" as to the nature of the presumption as was noted in Sandstrom, 442 U.S. at 514, 99 S.Ct. at 2454, the Franklin court established that the instruction included a mandatory presumption, i.e., a presumption which "instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." 105 S.Ct. at

1971. The Court then applied the Sandstrom standard of relief of burden of proof on an element of the crime charged. Id. On the basis of that analysis, however, Franklin extended the Sandstrom decision and found that use of any mandatory rebuttable presumption in a jury instruction is unconstitutional.

> A mandatory rebuttable presumption . . . relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous [then an irrebuttable or conclusive presumption] from the defendant's perspective, but it is no less unconstitutional.

Id. at 1972-73.

The instruction given in this case is different from the instructions found to be unconstitutional in Sandstrom and Franklin. In this case the trial court instructed the jury that possession of recently stolen property, in the absence of a satisfactory explanation, is "prima facie" evidence of theft by the person in possession of the property. Such an instruction, nevertheless, fits within the Franklin definition of a mandatory rebuttable presumption: "A [mandatory] rebuttable presumption . . . requires the jury to find the element unless the defendant persuades the jury that such a finding is unwarranted." 105 S.Ct. at 1971, n. 2.

We therefore hold that the instruction given in this case was unconstitutional. Further, although there was another instruction given, instruction No. 25, which

restated the presumption in permissive form, the additional instruction failed to cure the defect. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." 105 S.Ct. at 1975 (footnote omitted). Thus, because the mandatory presumption in question directly related to the determination of defendant's guilt, we hold that defendants are entitled to a new trial.

In reaching this decision, we further note that instruction No. 18 was accompanied by another instruction which defined "prima facie." Instruction No. 19 read as follows:

> The term "Prima Facie" as used herein means, at first sight; on the first appearance; on the face of it;

so far as can be judged from the first disclosure; presumably, a fact presumed to be true unless disproved by some evidence to the contrary. (Emphasis added.) The use of the word "disproved" could well have indicated to a juror that the defendants were required to disprove guilt. An instruction which could reasonably be understood to relieve the State of its burden of proof is constitutionally defective. See Sandstrom, 442 U.S. 510, 524, 99 S.Ct. at 2459. Thus, the use of this instruction would itself have required reversal based on principles dictated by Sandstrom and without reference to the stricter application prescribed by Franklin.

Finally, we address the continued viability of the language of U.C.A., 1953, § 76-6-402(1). Although a jury instruction which used the statutory language verbatim

is, as we have stated, unconstitutional, we find no similar infirmity in the statute itself as the statute, properly construed, is directed to the court. In State v. Asay, Utah, 631 P.2d 861 (1981), this Court construed the function of section 76-6-402(1) and upheld an instruction which, unlike the instant case, did not use the statutory language. The Court pointed out that the statute does not affect the jury's weighing of the evidence; rather, the statute provides a standard by which to determine the sufficiency of the evidence for submitting the case to the jury. The statute may properly be used to defeat a claim by a defendant that the State has, as a matter of law, failed to establish a prima facie case against the defendant. Id. at 864; State v. Gellatly, 22 Utah 2d 149, 151, 449 P.2d 993, 994-95 (1969). This construction of the statute is consistent with our

early decisions which found that giving an instruction using the term prima facie was improper, although not prejudicial where the court further instructed the jury that the State must prove guilt beyond a reasonable doubt. State v. Crowder, 114 Utah 202, 210, 197 P.2d 917, 921-22 (1948); State v. Hall, 105 Utah 162, 175-76, 145 P.2d 494, 500 (1944). In State v. Crowder, the Court said, "what constitutes a prima facie case is one for the court to determine and the jury does not pass on nor is it concerned at all with that question. . . . This statute is addressed only to the court. . . . " 114 Utah at 209-10, 197 P.2d at 921, (referring to U.C.A., 1943, § 103-36-1, unsatisfactory explanation of recently stolen property is prima facie evidence of guilt). Similarly, in State v. Hall, 105 Utah at 175, 197 P.2d at 500, the Court noted:

> The jury is not concerned with a determination of when the State has made out a prima facie case; its duty is to determine the issue of ultimate guilt.
>
> An instruction . . . which concerns the evidence necessary to make out a prima facie case for the State would only be confusing and might lead the jury to conclude the State had met its burden of proving ultimate guilt beyond a reasonable doubt by making out a prima facie case.

(Citations omitted.) The Court then concluded that the prima facie instruction was improper but not prejudicial in light of other instructions regarding the State's burden of proof.

In State v. Baretta, 47 Utah 479, 155 P.343 (1916), the Court indicated that only

in cases where the burden of proof shifts may juries properly be concerned with questions of what constitutes a prima facie case (i.e., civil cases). In criminal cases, however, where the burden remains on the State throughout the case, the jury should not be involved in such considerations.

> Undoubtedly, the court has to do with questions of a prima facie case whenever it withholds from, or submits a case to, the jury. But that determination . . . is one of law and not of fact. . . . So, when a case as this is submitted to a jury, they have nothing to do with questions of what is or what is not, a prima facie case. . . . They, to convict, are required to find an accused guilty beyond a reasonable doubt. . . . We think a charge, that recent possession of

stolen property when the party in possession failed to make a satisfactory explanation was prima facie evidence of guilt, may do harm by singling out and emphasizing particular evidence in a cause to the exclusion of other evidence which may be of equal or greater importance, and, without further explanation or direction, may tend to convey a meaning to the jury that when such enumerated particulars are shown the burden or proof is shifted to the accused, which, if not sustained by him, requires the verdict to be case against him. . . . So, we do not see what the question of a prima facie case has to do with the jury and think the charge ought not to have been given.

47 Utah at 489-90, 155 P.2d at 346-47. (Citations omitted).

We therefore conclude that a jury instruction using the language of U.C.A., 1953, § 76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof. The statute itself, however, is addressed to the court and merely provides a standard by which to determine whether the evidence presented warrants submission to the jury. Thus, the statutory language should not be used in any form in instructing juries in criminal cases, and we expressly disavow the language and holdings of our earlier cases to the contrary. On that basis, the statute is not constitutionally defective.

Defendants also claim that the evidence in this case was insufficient to support their convictions. Because we are

remanding for a new trial, we do not treat this issue.

The judgment of conviction is reversed and the case is remanded for a new trial.

HALL, C. J. and STEWART, HOWE and ZIMMERMAN, J. J., concur.